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Supreme Court
FILED

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No. OFFICE OF THE CLERK

In The

SUPREME COURT of the UNITED STATES

HARALD NEIDERT and DIXIE NEIDERT, H/W,
Petitioners

v.

GLEN ONOKO ESTATES, Respondent

LISA SMULLIGAN, Petitioner

v.

GLEN ONOKO ESTATES, Respondent

On the Petition for Writ of Certiorari
To The Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. After Trial held in the Court of Common Pleas a judgment was rendered for Respondent herein and Petitioners thereafter appealed without filing a Post-verdict Motion as required by Pa. Rule of Civil Procedure No. 227.1. The Trial Court Judge issued an Order requiring issues being raised upon appeal as required by Pa. Rule of Appellate Procedure No. 1925(b) which was filed on behalf of petitioners. Subsequent to the filing of the Rule 1925(b) statement the Common Pleas Judge issued a supplemental opinion stating that he had covered in his Opinion and Supplemental Opinion, all issues raised by Petitioners in their Rule 1925(b) statement. When the appeal was received by the Superior Court of Pennsylvania it was initially refused because the appeal was premature and no final Order was entered and later the appeal was quashed because the "issues were not preserved and are waived" for failure to file the post-verdict Motion as required by Pa. R.C.P. No. 227.1. The Petitioners assert that the Superior Court misapplied the Rule in that the lower Court took advantage of the opportunity to review its findings and correct any errors which is the basis of the Rule, Soderberg vs. Weisel, 455 Pa. Super 158, 687 A.2d 839(1997), Capital Care Corp. Vs. Hunt, 2004 Pa. Super 64, 847 A.2d 75 (2004); Ty-Button Tie, Inc. Vs. Kincel and Co., Ltd., 2002 PA. Super, 375, 814 A.2d 685(2002). This Rule is based upon the Federal Rule of Civil Procedure 50(b) whereby the movant may renew a request for judgment as a matter of law within ten(10) days of the entry of a verdict by filing a post-verdict motion in writing with the court. Petitioners raise the issue under 28 USCS section

2106 and request that this Honorable Court reverse the Order of the lower Courts and direct that since the trial judge acted on the Issues raised upon appeal by the issuance of a Supplemental Opinion that pursuant to Pennsylvania law that the appeal should be heard upon the merits and not quashed for a technical violation of the Rules.

LIST OF PARTIES

[x] All parties appear to the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OPINIONS BELOW

[X] For cases from state courts:

The opinion of the highest state court to review the merits(The Common Pleas Court of Carbon County) appears, at Appendix B and C to the petition and is

[ ] reported at_____; or

[ ] has been designated for publication but is not yet reported; or

[x} is unpublished see Carbon County No. 03-3817 and No. 03-3818(2006)

The opinion of the State Trial Court appears at Appendix B and C to the petition and is

[ ] reported at_____; or

[ ] has been designated for publication but is not yet reported; or

[x] is unpublished.

The decision of the Pennsylvania State Supreme Court denying the allocatur appears at Appendix D to the petition and is

[ ] is reported at_____; or

[ ] has been designated for publication but is not yet reported; or

[x] is unpublished see 2007 PA. Lexis

The decision of the Pennsylvania State Supreme Court denying the rehearing appears at Appendix E to the Petition and is

[ ] reported at_____; or

[ ] has been designated for publication but is not yet reported; or

[x] is unpublished

JURISDICTION

[X] For cases from **state courts:**

The date on which the highest state court decided my case was March 08, 2007.

A copy of that decision appears at Appendix D

[X} A timely Petition for Rehearing was thereafter denied on May 9, 2007, and a copy of the order denying rehearing appears at Appendix E.

The Jurisdiction of this court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Pennsylvania Constitution, Article V, Section 9

There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

B. 28 U.S.C.S. Section 2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

Appellee, a Property Owners' Association, acquired the roads within the development known as Glen Onoko Estates from Pocono Countryside Properties Owners Association by Deed dated August 21, 2002. The Appellants are not members of the Property Owners Association but own land immediately adjacent to the land owned by Appellees and based upon their locale they have to cross a three- tenths of a mile stretch of roadway owned by the Appellees. The Appellants have made this crossing since they first acquired ownership of their respective properties dating back to 1986.

Appellees began to bill Appellants a yearly fee of $150 per lot owned commencing in 2002 purportedly for road maintenance throughout the entire development. Commencing in 2004 Appellees began to bill Appellants $250 per lot owned or the same as lot owners within the development. The fee assessed is based upon lots owned and not on membership within the Property Owners' Association. The fees being billed by Appellees were determined at a meeting of the membership to which appellants were neither invited nor given an opportunity to have input.

A Non-Jury Trial was ultimately held on October 20, 2005 before Senior Judge Edward G. Biester who thereafter issued an Opinion and Verdict on March 28, 2006 in favor of Appellees and against the appellants.

A timely appeal to the Pennsylvania Superior Court was filed. By Order dated June 26. 2006 the Superior Court quashed the appeal for not filing post-verdict motions and for filing an appeal before the entry of a judgment against the appellants. Appellants filed a Motion for Re-Argument or for

Re-Consideration establishing that there was indeed a judgment which had been entered and that the lower court had stated in a supplemental Opinion that it had fully and adequately considered all issues raised by appellants in this matter as stated in the Issues for appeal which was filed on behalf of appellants. By Order dated August 10, 2006 and mailed August 11, 2006 the Superior Court of Pennsylvania denied the request for reconsideration which caused a Petition to be filed for Allocatur to the Pennsylvania Supreme Court on September 11, 2006. The Supreme Court initially denied the appeal as untimely stating that the request for reconsideration to the Superior Court should have been filed on July 10, 2006 not as docketed on July 12, 2006. Only upon proof by way of a certificate of mailing did the Pennsylvania Supreme Court reverse itself and agree that the appeal was timely filed. By Order dated March 8, 2007 the Pennsylvania Supreme Court denied the request for Allocatur. A timely request for reconsideration was filed on March 22, 2007 which was likewise denied on May 8, 2007 from which this appeal arises.

REASONS FOR GRANTING THE PETITION

Article V, Section 9 of the Pennsylvania Constitution provides that "There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law." Appellants submit that Pa. Rule of Appellate Procedure No. 1114, note (1) indicates that "Where the appellate court below has decided a question of substance not theretofore determined by the Superior Court, or has decided it in a way probably not in accord with applicable decisions of the Supreme Court of Pennsylvania or the Supreme Court of the United States." Specifically, the Superior Court of Pennsylvania has addresses the issue of quashing an appeal for failure to file post-verdict motions in the lower court pursuant to PA.R.C.P. 227.1 and the considerations that should actually go into situations when this extreme action should be imposed by the court.

Pa. Rule of Civil Procedure No. 227.1 provides as follows:

(a) After trial and upon written Motion for Post-Trial Relief filed by any party, the court may

(1) order a new trial as to all or any of the issues; or

(2) direct the entry of judgment in favor of any party; or

(3) remove a nonsuit; or

(4) affirm, modify or change the decision; or

(5) enter any other appropriate remedy

(b) Except as otherwise provided by Pa.R.E. 103(a), post-trial relief may not be granted unless the grounds therefor,

(1) if then available, were raised in pre-trial proceedings or by motion, objection, point for charge, request for findings of fact or conclusions of law, offer of proof or other appropriate method at trial.

The Pennsylvania Courts have decided quite a number of cases pertaining to the preservation of issues for appeal and the applicability of Pa. R.C.P. No. 227.1 in the process. In L.B. Foster Co. V. Lane Enterprises,Inc., 551 Pa. 307, 710 A.2d 55 (Pa. 1998), the Pennsylvania Supreme Court held that parties are to file post-trial motions in order to preserve issues for appeal and any issue not raised in a post-trial motion is waived for purposes of appeal, Benson v. Penn Central transportation Company, 463 PA. 37, 342 A.2d 393(1975); Commonwealth v. Metz, 534 PA. 341, 633 A.2d 125(1993).

However, the Supreme Court did establish exceptions to the aforesaid Rule, specifically, where an appellant raises an issue post-trial in a procedurally defective manner and the trial court chooses to overlook the defect and address the issue on the merits. Commonwealth v. Sheaff, 518 Pa. 655, 544 A.2d 1342(1988); Kurtas v. Kurtas,521 PA. 105, 555 A.2d 804(1989); Commonwealth v. Hewett. 380 Pa. Super 334, 551 A.2d 1080(1988); Commonwealth v. Sopota, 403 Pa. Super 1, 587 A.2d 805(1991). Capital Care Corp. V. Hunt, 2004 Pa. Super 64, 847 A.2d 75 (Pa. Super 2004); Ty-Button Tie, Inc. V. Kincel and Co., Ltd., 2002 Pa. Super 375, 814 A.2d 685 (Pa. Super 2002)These decisions all point to situations where the lower court judge did not face properly raised post-trial motions but the lower court judge

went ahead and decided the issues anyway. The purpose of the Rule is to give the trial court the opportunity to correct its own error, Chalkey v. Roush,2000 Pa. Super 223, 757 A.2d 972 (Pa. Super 2000); Soderberg v. Weisel, 455 Pa. Super 158, 687 A.2d 839(Pa. Super 1997). Appellants assert that Rule 227,1 was intended to promote judicial economy in providing every opportunity to the trial court to completely and fully examine every issue raised in a trial and not to have any issue raised for the first time upon appeal.

The implementation of this Rule is quite similar to Federal Rule 50(b) which provides that "If the court does not grant a motion for judgment as a matter of law... the movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment..." The spirit of the Federal Rules of Civil Procedure favors preservation of a court's power to avoid manifestly unjust results, (See Johnson v. New York, N.H.&H.R. Co., 344 US 48,, 62, 73 S.Ct. 125, 97 L.Ed. 77 (1952). The U.S. Supreme Court pursuant to the power it holds as stated in 28 U.S.C.S. Section 2106 can "affirm, modify, vacate, set aside or reverse any judgment, decree, or order of court lawfully brought before ir for review". "It is well settled that a litigant's waiver or forfeiture of an argument does not, in the absence of a contrary statutory command, preclude a court of appeals from considering those arguments," Singleton v. Wulff, 428 U.S. 106, 121, 96. S.Ct. 2868, 49 L.Ed. 2d 826 (1976). Arguments raised for the first time on appeal may be entertained if their consideration would prevent manifest injustice, Singleton.

In the instant case, despite the absence of post-verdict motions filed on behalf of appellants, the trial judge clearly states that he has adequately discussed all of the issues even those raised in the Issues to be Raised upon Appeal as required by the Trial Judge. The trial judge even went so far

as to file a Supplemental Opinion to explain that he did have adequate and ample opportunity to discuss all the issues raised. Appellants contend that they have raised and adequately preserved all issues through the filed Proposed Findings of Fact and Conclusions of Law which they filed along with the aforesaid "Issues to be Raised upon Appeal" which was filed.

In addition, close review of Rule 227.1(b) provides that the issues raised "... in pre-trial proceedings or by motion, objection, point for charge, request for findings of fact or conclusions of law, offer of proof or other appropriate method at trial, " are sufficient for the purpose of preserving issues for appeal. In the instant case, all parties submitted findings of fact and conclusions of law for consideration by the court. Appellants contend that quashing the appeal flies in the face of the Rule since preservation of issues for appeal is permitted by way of submission of findings of fact and conclusions of law. Clearly, the Superior Court of Pennsylvania erred in quashing this appeal since the issues were indeed preserved in ways permitted by the courts in previous decisions and also by the Rules themselves.

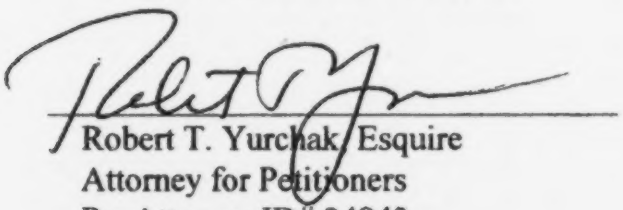
Finally, Pa. Rule of Appellate Procedure No. 105 provides for the liberal construction of the Rules to secure the just, speedy, and inexpensive determination of every matter in which they may be applicable. Specifically, the Rule provides "In the interest of expediting decision, or other good cause shown, an appellate court may, except as otherwise provided in Subdivision(b) of this rule, disregard the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction." Based on the peculiar circumstances of this case and the consideration of the trial court and also upon 28 U.S.C.S.

Section 2106 the appellants make application to this Honorable Court to permit this matter to be considered on appeal for the merits and not upon a mechanical application of the filing of a motion based upon a rule the purpose of which was met. Consideration was given to all issues to be raised on appeal and appellants only seek the consideration of their appeal upon the issues and not some procedural nicety.

CONCLUSION:

WHEREFORE, Appellants respectfully request that this Honorable Court grant Appellants the Writ of Certiorari.

RESPECTFULLY SUBMITTED,



Robert T. Yurchak, Esquire
Attorney for Petitioners
Pa. Attorney ID# 34943
Date: 8-6-07

APPENDIX A

IN THE SUPERIOR COURT OF PENNSYLVANIA

GLEN ONOKO ESTATE, Appellee

VS.

HARALD NEIDERT AND
DIXIE NEIDERT, Appellants

(C.P. CARBON COUNTY NO 03-3817)

GLEN ONOKO ESTATES, Appellee

VS.

LISA SMULLIGAN, Appellant

(C.P. CARBON COUNTY NO.03-3818)

No. 1139 EDA 2006 Filed: August 10, 2006

ORDER

Appellants application for reconsideration of this Court's Order of June 26, 2006 is **DENIED.**

Per Curiam

APPENDIX B

IN THE SUPERIOR COURT OF PENNSYLVANIA

GLEN ONOKO ESTATE, Appellee

VS.

HARALD NEIDERT AND
DIXIE NEIDERT, Appellants

(C.P. CARBON COUNTY NO 03-3817)

GLEN ONOKO ESTATES, Appellee

VS.

LISA SMULLIGAN, Appellant

(C.P. CARBON COUNTY NO.03-3818)

No. 1139 EDA 2006 Filed: August 10, 2006

ORDER

This appeal has been taken from the March 28, 2006 Non-jury trial decision.

An order entering a verdict in favor of one party is not immediately appealable and an appeal must be quashed as premature unless a final judgment has been entered on the docket, Reuter v. Citizens & Northern Bank, 599 A.2d

673(Pa. Super 1991); Weiser v. Bethlehem Steel Corp, 508 A.2d 141 (Pa. Super 1986), Pa. R.C.P. 227.1(c)(2) states: "Post-trial motions *shall* be filed within ten days after notice of nonsuit or *the filing of the decision or adjudication in the case of a trial without a jury* or equity trial."(emphasis supplied). Pa.R.A.P. 302(a) states: "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." *See* *Diener Brick Co. V. Mastro Masonry Contractor,* 885 A.2d 1034(Pa. Super2005)(issues not raised in post-trial motions are waived for purposes of appeal; filing of Pa.R.A.P.1925(b) statement raising issue is not an adequate substitute for the raising of the issue in post-trial motions); *Chalkey vs. Roush,* 805 A.2d 491(Pa. 2002)(under Pa.R.C.P. 227.1, a party must file post-trial motions at the conclusion of a trial in any type of action in order to preserve claims that the party may wish to raise on appeal).

Accordingly, the appeal at No. 1139 EDA 2006 is hereby **QUASHED.**

Per Curiam

APPENDIX C

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

GLEN ONOKO ESTATES NO 03-3817

VS.

HARALD NEIDERT AND
DIXIE NEIDERT

GLEN ONOKO ESTATES

NO.03-3818

VS.

LISA SMULLIGAN

OPINION

Biester, S.J.– March 28, 2006

Glen Onoko Estates filed a Complaint in the nature of a Debt Collection action. After a Bench Trial was held on October 20,2005, and upo consideration of the submissions of the parties, we make the following:

FINDINGS OF FACT

1. Plaintiff is Glen Onoko Estates, a Pennsylvania Non-Profit Corporation with its principal office at 1001 Glen Onoko Drive, Jim Thorpe, PA. 18229.

2. Defendants, Harald and Dixie Neidert, are married, and are adult individuals with an address of 246 Glen View Drive, Jim Thorpe, PA. 18229.

3. Defendant is Lisa Smulligan, an adult individual with an address of P.O. Box 23, Jim Thorpe, PA. 18229.

4. Defendants, Harald Neider and Dixie Neidert, are currently the owners of two lots.(N.T. 10/20/05 page 83)

5. Defendant Lisa Smulligan is the owner of Lots 205, 206, 207, 208, 209, 210 and 214 Summit Drive, Jim Thorpe 18229.

6. Glen Onoko was formed as a Domestic Non-Profit Corporation by filing Articles of Incorporation on June 13, 2001. (Exhibit P-1).

7. Glen Onoko Estates acquired all the roads within the development known as Glen Onoko Estates from Pocono Country Side Properties Owners Association by Deed dated August 21, 2002 and recorded in the Office for the Recorder of Deeds in Carbon County in Book 1047, Page 221. (Exhibit P-3)

8. The deed of August 21, 2002 includes an assignment from the prior owner to Glen Onoko Estates of all present and future rights and privileges to collect dues or fees for road maintenance and maintenance of common areas. (Exhibit P-3)

9. Prior to the formation of Glen Onoko Estates in June of 2001 Pocono Country Side Property Owners

Association was the party which maintained the roads within the development. (N.T. Page 13)

10. Prior to Glen Onoko Estates incorporating the owners within what was then known as Leisureland and now Glen Onoko Estates were notified that Pocono Country Side would no longer be plowing the roads within the development or maintaining the roads within the development. (N.T. page 13)

11. Glen Onoko estates was created because the prior developer was failing to maintain the roads and notified the owners within Glen Onoko Estates/Leisureland that they were not going to maintain the roads any longer. (N.T. pages 13,14)

12. Glen Onoko Estates was formed so that the roads would be maintained and that the people within the development and those who necessarily need to use the roads can get to their properties. (N.T. page 15)

13. The condition of the roads in the year 2000 was very poor. The only maintenance was the plowing of roads and even that was occasional. In fact, there was so little maintenance, when there was a snowstorm there was a possibility that the homeowners who needed to use the roads would not be able to do so. There would be delays in exiting the development of Glen Onoko Estates and the surrounding developments because of high snow and individuals would not be able to get to work. Nor, obviously, could emergency vehicles have access to the residents. (N.T. pages 15,16)

14. The maintenance of the roads by the Plaintiff within Glen Onoko Estates began in the winter of 2001 into 2002. (N.T. Page 16).

15. The roads to and in Glen Onoko Estates are described in the deed of August 22, 2002. Further, the roads are accurately depicted on the map that had been submitted as Exhibit P-4. As shown on Exhibit P-4, Onoko Lane is a public road. Onoko Lane connects to Woodside Drive which is a road within the Development of Glen Onoko Estates. Woodside Drive is approximately 3/10ths of a mile in length and eventually meets the development known as "Top of the Gorge." (N.T. page 19) (Exhibit P-4).

16. Woodside Drive then connects with Broadview Drive. Broadview Drive travels through the development of Glen Onoko Estates and eventually meets with State Route 903. (N.T. page 19)(Exhibit P-4).

17. Lisa Smulligan and the Neiderts own lots within the "Top of the Gorge" development. The ownership of these lots was admitted in the pleadings. Further, the deeds for Lisa Smulligan were admitted as Exhibit P-5. The deeds for the Neiderts were admitted as Exhibit P-6.

18. The Defendants Lisa Smulligan and the Neidets cannot leave their property directly upon a public road. In order to access their property they must cross over and upon roads within and maintained by Glen Onoko Estates. Obviously, this includes access by emergency vehicles. (N.T. pages 21,22) (Exhibit P-4).

19. The maintenance of the roads by Glen Onoko Estates includes snow plowing, installing guard units, installing drainage, tar and chipping portions of roadway, repairing potholes, erecting stop signs, and widening roadways so that more than one car can travel on them at a time. (N.T. pages 23, 24).

20. Exhibit P-7 shows the number of lots within Glen Onoko Estates which need to use the roads and the number of lots within the satellite developments which need to use the roads. (N.T. pages 24, 25).

21. As of 2002 there were 162 member lots who used the roads and there were 98 ingress and egress lots which used the roads. Therefore, the percentage of members who used the roads was 63% and the percentage of nonmembers who used the roads was 37%. (N.T. pages 25, 26).

22. The amount billed to each lot owner within Glen Onoko Estates and in the satellite development in $250.00. However, prior to 2003 the ingress/egress lot owners were billed only $150.00/lot. (N.T. page 26).

23. The fee is based upon lots owned and not on membership within the Property Owners' Association.

24. None of the Defendants is a member of the Property Owners' Association/ Plaintiff, and none of the Defendants participates in the process of setting fees.

25. Plaintiff has no direct or formal contractual relationship with Defendants to provide road maintenance.

26. Defendants' lots are one-half acre in size. (N.T. Pages 65, 84).

27. Glen Onoko Estates' sole use of the money it collects is road maintenance. Glen Onoko Estates does not operate a clubhouse, pool, or any other amenities in which it spends money. This is also shown by the reports that were submitted for the years 2002-2004 as Exhibits P-8, P-9 and P-10.

28. Defendants have no input into the budget of Plaintiff.

29. The total length of the roadway in Glen Onoko Estates is approximately six (6) miles. One of the roads owned by Glen Onoko Estates is Woodside Drive. Glen Onoko Estates had only recently learned that it owns a portion of Woodside near the Top of the Gorge Development. Glen Onoko discovered this by a recent survey. (N.T. Pages 33, 39).

30. The work done on the roads in Glen Onoko Estates has not been extravagant. The amount that has been collected is enough to plow the roads and perform some maintenance. No roads are macadam. At best they are tar and chip and in fact some of them are still dirt roads. (N.T., Pages 41, 47).

31. The Officers and Board Members of Glen Onoko Estates are not compensated for their duties. (N.T. Page 52).

32. The Assistant Treasurer testified regarding some of the major improvements that had been done to the roads within Glen Onoko Estates. One of those

improvements was for water drainage and run off on the road. This improvement was reflected by a bill for $18,611.11, admitted as Exhibit P-11. (N.T. pages 53, 54).

33. Some of the tar and chipping and pothole repair occurred on Broadview in the area of Woodside Drive. (N.T. Page 59).

34. Lisa Smulligan uses the roads in Glen Onoko Estates, in particular Woodside Drive. Additionally, Lisa Smulligan uses the other roads, but only very rarely, for bike riding or out of curiosity. (N.T. pages 63, 67, 70).

35. Lisa Smulligan prefers dirt roads because she is a pedestrian and bicyclist and cannot stand the danger that a tar and chip road presents. (N.T. page 68).

36. Despite the fact that Lisa Smulligan does not wish to pay for maintenance, she presented testimony in which she complained of the poor condition of Woodside Drive. She further testified that there is a sign on the road of Woodside Drive that said "Private Road, No Outlet." (N.T., pages 71, 72, 77).

37. Lisa Smulligan admits that she does pay for some maintenance of the roads within her own development, Top of the Gorge, on an informal ad hoc basis. (N.T. page 75).

38. Lisa Smulligan admitted that she and visitors who may come to her house must necessarily use some portion of Glen Onoko Estates' roads. (N.T. page 81).

39. Lisa Smulligan stated that she does not want to become part of the Association because of the Association problems. She described these problems as difficulties that the Glen Onoko Estates' residents have getting out if no one plows the roads. When asked if she had any problems getting in and out due to no one plowing she responded "I don't go out much." (N.T. page 82).

40. Harald Neidert admitted that he uses the roads in Glen Onoko Estates in particularly Woodside Drive. (N.T. pages 85, 86, 89).

41. Harald Neidert testified that some of the problems on Woodside Drive and Broadview stem from water runoff. (N.T. page 91).

42. Dixie Neidert testified that she and her visitors use Woodside Drive and that she would like the potholes repaired. (N.T. pages 97, 98).

CONCLUSIONS OF LAW

1. Glen Onoko Estates is the owner of the roads within the development known as Glen Onoko Estates.

2. Defendants, Lisa Smulligan, Harald Neidert and Dixie Neidert must and do use some portion of the roads within Glen Onoko Estates.

3. $250.00 per lot, which is the amount currently billed by Glen Onoko Estates for the maintenance of the roads, is a reasonable fee.

4. The Defendants have failed to pay any amount for the maintenance of the roads within Glen Onoko Estates.

5. The Defendants are legally obligated to pay a fair share of the expense of maintaining the roads within Glen Onoko Estates.

6. We find that the amount of $150.00 per lot in 2002, and $250.00 each year there after are fair assessments for the maintenance of the roads.

DISCUSSION

There does not seem to exist a Pennsylvania case exactly on point regarding the assessment of association fees against residents whose property is located outside of the association's development. That being said it is clear that Pennsylvania Court have allowed associations to charge fees in situations comparable to the instant action.

For instance, in Meadow Run and Mountain Lake Park Association v. Beckel, 598 A.2d 1024 (Pa. Super. 1991), the court held that a home owner's association had the authority to impose fees for the maintenance of common areas even in the absence of a specific covenant in the property owners' deeds. The Meadow Run Court went on further to note that this authority is received by the mere mention of an association in the chain of title. A few years later the Commonwealth Court in Spinnler Point Colony Assocaition v. Nash, 689 A. 2d 1026 (Pa. Cmwlth. 1997), took the holding in Meadow Run one step further and held that even if the chain of title lacks mention of an association one may be formed and impose certain fees on the property owners. The Spinnler Court noted:

> Residential communities are analogous to mini-governments and as such are dependent on the collection of assessments to maintain and provide essential and recreational facilities. When ownership of property within a residential community allows the owners to utilize the roads and other common areas of the development, there is an implied agreement to accept the proportionate cost for maintaining and repairing these facilities.

Id. At 1028-1029.

More recently the Commonwealth Court in Hess v. Barton, 718 A.2d 908 (Pa. Cmwlth 1998) explained:

> [T]he owners are the beneficial users of the common area of the development and...are responsible for the cost of repair, maintenance and upkeep of the common areas. If we were to find to the contrary, lot owners would be able to avoid their duty to pay assessments, and because associations would be powerless to operate, the facilities of a development would fall into disrepair. Thus, we hold that a property owner who purchases property in a private residential development who has the right to travel the development roads...is obligated to pay a proportionate share for repair, upkeep and maintenance of the development's roads, facilities and amenities.

What is most indicative of the current law in this county can be found in the case of Holiday Pocono Civic Association v. Benick, 7 Pa. D&C 3rd 378 (Carbon County 1978). In Holiday the Defendants insisted that because they

were not technically members of the Association they were not liable to pay the fees assessed against them. Our Court was somewhat progressive in addressing this concern by stating: "[W]e... find that the obligation to pay dues and assessments exists independently of membership in the association." Id. At 384. In Holiday Judge John P. Lavelle went on to adopt the language of a New York case that held:

> [A]ll of the cited decision establish the principle that membership in the Association bears no relationship to the rights of the property owners in so far as their enjoyment of the easements running with their property is concerned. The right of the Association to exercise the control of the easements and to maintain them in condition so that they can be mutually used and enjoyed by all property owners has long been settled by the courts. Inherent in the right to management is the right to maintain, Maintenance costs money. Those who are entitled to enjoy easements are the ones who must pay the cost of maintenance. Membership in the corporation is not that which gives the right to the property owners to enjoy the easements and services provided by the Association. It is the ownership of the property which effects that result.

Id. At 384-385, (quoting, Sea Gate Association v. Fleischer, 211 N.Y.S. 2d 767, 778-779 (1960)).

Given Judge Lavelle's opinion in Holiday, we are confident that our decision in this matter is based upon law that is firmly rooted in this county, and consistent with other Pennsylvania cases. Moreover only sixty-three percent(63%) of the users of the roads reside within Glen Onoko Estates

Development. If only theresidents of Glen Onoko estates were obligated to pay for the maintenance of al the roadways including those that are regularly used by the residents of the satellite developments the quality of the roadways would rapidly deteriorate. Additionally, we feel that a fee of $250.00 per lot is reasonable in as much as the portion of the road in which the Defendants and other nonresidents utilize is a vital and heavily traveled section of the road for both residents of Glen Onoko Estates and nonresidents alike. This portion of the roadway requires maintenance and that maintenance must be paid by all persons who use the road to access their property. The nonresidents should not be afforded a free ride simply because they are not technically members of the Association assessing the fees. It would be inequitable to allow the defendants to continue to use the roads that are maintained by the Plaintiff without sharing the costs. To hold otherwise would promote a considerable inequity.

The Defendants challenge the fairness of the fee in that they use only a brief portion of the road. However, as we noted that location is perhaps the most heavily traveled. It would stretch common sense to allocate the burden as to other owners on the rest of the roads based on proximity or distance from the basic feeder road.

CONCLUSION

In consideration of the above discussion we conclude that a fee can be assessed against and collected from the Defendants, and all other nonmember lot owners.

Accordingly, we enter the following:

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

GLEN ONOKO ESTATES NO 03-3817

VS.

HARALD NEIDERT AND
DIXIE NEIDERT

GLEN ONOKO ESTATES

NO.03-3818

VS.

LISA SMULLIGAN

VERDICT

AND NOW, this 28th day of March, 2006, the above case, in the nature of an Action for Debt Collection, having come before the Court for a Bench Trial, the Court finds as follows:

1. **IN FAVOR** of the Plaintiff, Glen Onoko Estates, and **AGAINST** the Defendants, Harald Neidert and Dixis Neidert, on Count I of the Complaint, in the amount of $600.00.

2. **IN FAVOR** of the Plaintiff, Glen Onoko Estates, and **AGAINST** the Defendant, Lisa Smulligan, on Count I of the Complaint, in the amount of $1,050.00.

BY THE COURT:
/s/ Edward G. Biester, Jr.,S.J.

APPENDIX D

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

GLEN ONOKO ESTATES NO 03-3817

VS.

HARALD NEIDERT AND
DIXIE NEIDERT

GLEN ONOKO ESTATES

NO.03-3818

VS.

LISA SMULLIGAN

SUPPLEMENTAL OPINION

The Court has received and reviewed Plaintiff's Statements of Issues complained of on appeal, pursuant to Pa. Rule of Civil Procedure 1925(b). After thorough review, it is clear that all of the issues raised by Plaintiff have been covered in the Court's opinion of March 31, 2006, incorporated herein by reference.

A short discussion of the common law pertaining to easements that burden real property will serve to clarify the Court's decision in this dispute.

In the instant case, each Defendant has admitted that they and their visitors must, by necessity, use a portion of Plaintiff's roadway for ingress and egress to their property.

They have been doing so since 1986. This required use by Defendants of Plaintiff's land creates an easement by necessity. See *PARC Holdings Inc. V. Killian,* 785 A.2d 106 (Pa. Super., 2001).

An easement by necessity establishes both legal rights and responsibilities between the parties. The holder of an easement over the land of another obtains the right to enter and use a portion of that land and thereby becomes the dominant estate; the land so burdened becomes the servient estate. The holder of the dominant estate may enter and use the servient estate according to the rights afforded it by the easement. Common law provides that the holder of the servient estate may not interfere with the enjoyment of the rights granted to the dominant estate by the terms of the easement. *Kao v. Haldeman,* 728 A.2d 345 (Pa. 1999).

However, the holder of the servient estate is not generally responsible for the maintenance of the easement, and is not required to sustain any expense in keeping the easement in proper condition, those expenses are the responsibility of the holder of the dominant estate. *Phillips, et. al. V. Smelka, et. ux.,* 34 Erie C.L.J. 117, 76 Pa. D&C 287 (1951). Accordingly, owners of dominant estate have both rights and obligations with respect to the easement.

As noted above, Defendants in the instant case have a right to use the Plaintiff's roadway through an easement by necessity. But significantly, as holders of a dominant estate, they have also taken on a responsibility to effect repairs on the easement, and to pay for the same.

In situation such as the instant one, where the easement is used by both the servient and dominant estate holders, courts have seen fit to distribute responsibility for the costs associated with maintaining the easement among the parties, allocating the costs according to the equities and expediencies involved. *Borgel v. Hoffman,* 280 A.2d 608

(Pa. Super, 1971); See also *Bina v. Bina*, 213 Iowa 432, 239 N.W. 68 (1931) and *Barnard v. Barnard*, 146 Colo. 409, 361 P.2d 778.

Because, in the instant case, the road is used both by the Defendants (as they must), as well as by the Plaintiffs, Defendants here have a duty to share in the costs of maintenance.

Therefore, as held in the aforementioned opinion in this matter, We find a legal obligation inures to Defendants to pay Plaintiff's assessment for maintaining the roadway, and further find that the amount of $250.00 per year per lot is reasonable and proper.

DATE: 6/27/06 BY THE COURT:

/S/ EDWARD G. BIESTER, JR., S.J.

APPENDIX E

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT
GLEN ONOKO ESTATE, Appellee

VS. No. 790 MAL 2006

HARALD NEIDERT AND
DIXIE NEIDERT, Appellants

(C.P. CARBON COUNTY NO 03-3817)

GLEN ONOKO ESTATES, Appellee

VS.

LISA SMULLIGAN, Appellant

(C.P. CARBON COUNTY NO.03-3818)

ORDER

PER CURIAM

AND NOW, this 8th day of March 2007, the Petition for Allowance of Appeal is denied.

APPENDIX F

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT
GLEN ONOKO ESTATE, Appellee

VS. No. 790 MAL 2006

HARALD NEIDERT AND
DIXIE NEIDERT, Appellants

(C.P. CARBON COUNTY NO 03-3817)

GLEN ONOKO ESTATES, Appellee

VS.

LISA SMULLIGAN, Appellant

(C.P. CARBON COUNTY NO.03-3818)

ORDER

PER CURIAM

AND NOW, this 8th day of May 2007, the Application fo Re: onsideration is denied.

Mr. Justice Fitzgerald did not participate in the consideration or decision of the matter.

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(2)

No. 07-169

FILED

OCT 26 2007

OFFICE OF THE
SUPREME COURT U.S.

In The

SUPREME COURT of the UNITED STATES

HARALD NEIDERT and DIXIE NEIDERT, H/W,
Petitioners

v.

GLEN ONOKO ESTATES, Respondent

LISA SMULLIGAN, Petitioner

v.

GLEN ONOKO ESTATES, Respondent

On the Petition for reconsideration of
denial of Writ of Certiorari
To The Supreme Court of Pennsylvania

PETITION FOR RECONSIDERATION OF DENIAL OF WRIT OF CERTIORARI

Robert T. Yurchak, Esquire
Counsel for Petitioners
Attorney ID# 34943
1 East Catawissa Street; POB 127
Nesquehoning, PA. 18240
(570)669-6650

PETITION FOR RECONSIDERATION:

1- The Opinion and Decision of Senior Judge Edward Biester is not a decision which is applicable to only the case of the Petitioners herein. It is being used as precedent for similar cases by the Glen Onoko Property Owners Association as the basis for pursuing other parties who are similarly situated to Petitioners herein. This use mandates that the Decision be fully considered now by the Appellate Courts or it will likely be considered at a later date when it is challenged as it should be.

2- On the date the Order was issued in this matter similar cases went to trial in a lower court whereupon it was shown that the Opinion of Judge Biester is inconsistent and contravenes applicable law. As a result the decision and Opinion was not followed. Because of this situation, unlike others similarly situated, Petitioners herein are being compelled, by a procedural error, not to have the merits of their case heard by an appellate court.

3- To preclude consideration by an Appellate Court based upon a procedural error does not comply with the dictates of Pa. Rule of Appellate Procedure No. 105 which provides for the liberal construction of the Rules to secure the just, speedy and inexpensive determination of every matter in which they may be applicable. Specifically, the rule provides "In the interest of expediting decision, or for other good cause shown, an appellate court may, except as otherwise provided in Subdivision (b) of this rule, disregard the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

4- Pa. Rule of Civil Procedure No. 227.1 was intended to provide a lower court with the opportunity to fully address all issues to be raised upon an appeal in the interest of judicial economy. It was not intended to forestall consideration upon the merits of a case when a lower court judge has specified that he has fully considered all issues to be considered upon appeal. To use it as a bar for a procedural error forestalls a party from resort to the Appellate process.

5- "The Spirit of the Federal Rules of Civil Procedure favors preservation of the court's power to avoid manifestly unjust results in exceptional cases." See Johnson vs. New York N.H. & H.R. Company, 344 U.S. 48, 73 S.Ct. 125, 97 L.Ed.73 (1952): Unitherm Food Systems vs. Swift-Eckrich,Inc., 546 U.S. 397, 216 S.Ct. 980, 163 L.Ed. 2d 974(2006).

6- The Dissent in Johnson, supra , stated "Procedure is the means; full, equal and substantive law is the end.: quoting Pound, :The Etiquette of Justice", 3 Proceedings Neb St. Bar Assn 231 (1909),

7- Judicial Economy would be best served by having the Appellate Courts address the issues presented by this case now which can then be correctly used as precedent for future cases rather than addressing them at a later date when they are sure to reach these levels again.

8- Failure to grant the Petitioner the means to appeal works a grave injustice to petitioners in that the merits of their appeal will not be addressed despite he full opportunity which the trial court had to determine all the issues presented. No review will be forthcoming of the decision of the lower court in this instance which serves to chill the due process rights of petitioner in this instance.

WHEREFORE, *Petitioners respectfully request that* this Honorable Court reconsider its denial of the Petition for Writ of Certiorari so that petitioners can have the issues raised by this appeal addressed and not to permit this matter to be decided on the basis of a procedural issue while never addressing the merits of the case.

Respectfully Submitted,

Robert T. Yurchak, Esquire
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Nesquehoning, PA. 18240
Attorney ID# 34943
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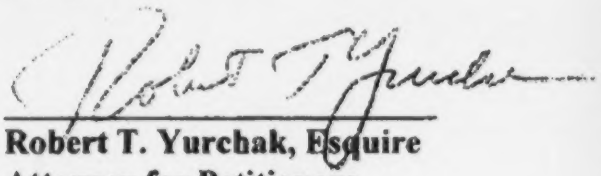
CERTIFICATE OF PRESENTATION IN GOOD FAITH

I, Robert T, Yurchak, Esquire, Attorney for the Petitioners herein, do hereby certify that I am presenting this Petition for reconsideration in Good Faith and I am not doing so merely for the purposes of delay. I further certify that the Application is restricted to the grounds stated herein.

Date: November 14, 2007



Robert T. Yurchak, Esquire
Attorney for Petitioners